

A Re The Detention of R Sivarasa & Ors

HIGH COURT (KUALA LUMPUR) — REVISION APPLICATION NO 43–25–96

KC VOHRAH J

20 NOVEMBER 1996

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Criminal Procedure — Remand order — Extension of detention period — Application before magistrate — No copy of ‘entries in the diary’ was transmitted to magistrate — Whether fatal to application — Whether three sheets of typewritten paper which consisted of a timetable of when suspects were being taken out from and being sent back to the cells constituted ‘entries in the diary’ — *Criminal Procedure Code (FMS Cap 6) ss 117 &*

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Criminal Procedure — Remand order — Extension of detention period — Application before magistrate — Duties of magistrate — Requirement that there be grounds for believing that accusation or information is well founded for police officer to make his application for detention — Whether grounds as stated in application subject to careful

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judicial scrutiny — Criminal Procedure Code (FMS Cap 6) s 117 — Federal Constitution art 5(4)

On 9 November 1996, 67 people were arrested by the police in an alleged demonstration which took place at Asia Hotel, Kuala Lumpur. The suspects were remanded under s 117 of the Criminal Procedure Code (FMS Cap 6) (‘the CPC’) from 10 November 1996 till 13 November 1996. An application was then made to the magistrate for an extension of the detention period of 10 suspects under s 117 of the CPC for another 10 days, ie from 13 November 1996 until 22 November 1996. Under the heading ‘Alasan-Alasan’ in the application, it was indicated, inter alia, that the application had to be made as the detention period was too short and was insufficient for the police to complete investigation. The magistrate stated at the end of her notes of proceedings that she was satisfied with the reasons as appeared in the application, and also in the investigation diary that was given. She went on to allow the application for the extension of detention. Apparently, the investigation diary that had been referred to by the magistrate consisted of three sheets of typewritten paper, which had the heading ‘Pergerakan Soalsiasat Tahanan’ and a timetable of when the 10 suspects were being taken out from and being sent back to the cells where they were detained. In the afternoon of 13 November 1996, an urgent application for the revision of the magistrate’s remand order under s 323 of the CPC was filed in the High Court. The complaint was that the omnibus remand order made on the 10 persons by the magistrate was not in compliance with s 117 of the CPC.

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Held, setting aside the magistrate’s remand order:

- (1) From the record of proceedings and the documents which the magistrate purported to rely on, it was clear that the magistrate had not appreciated the strict nature of s 117 of the CPC and the case law on the matter (see p 615G–H).

- (2) Pursuant to s 117 of the CPC, the police officer has a mandatory duty to transmit to a magistrate a copy of the entries in the diary as prescribed under s 119 of the CPC when producing a suspect before him (see p 616E and 617E–F). A
- (3) In this case, no copy of the entries in the diary was transmitted to the magistrate. This was fatal to the application for extension of detention, as it meant that the magistrate did not have the prescribed material (especially that referred to in s 119(1)(d)) to act upon in her judicial enquiry whether to order further remand (see p 618B). B
- (4) The three sheets of paper produced in this case did not contain copies of ‘entries in the diary’ as prescribed under s 119, and certainly did not relate to ‘the day by day’ proceedings of the officer making the police investigation which were entered into his diary. Also, the timetable listed in the papers could not be considered as copies of the entries prescribed under s 119 (see pp 616I and 617A–B). C
- (5) Section 117 of the CPC also requires that there be grounds for believing that the accusation or information is well founded for the police officer to make his application for detention. These grounds are subject to judicial scrutiny. It has to be stressed that a magistrate ought not give a remand order in police custody without his satisfying himself as to its necessity and that the period of remand ought also to be restricted to the necessities of the case. If the necessities of the case for remand or further remand are not shown, no remand order should be made (see p 619A, E); *Bal Krishna v Emperor* AIR 1931 Lah 99 followed. D
- (6) The liberty of an individual after arrest is at stake and art 5(4) of the Federal Constitution reposes an onerous judicial duty on a magistrate to decide whether a person should be detained or detained further (see p 618G). E
- (7) The application for extension of detention was an omnibus application for the detention of 10 named persons, and there was no condescension to details as to what each of them was arrested for and why it was necessary to extend the remand of each of them. Whatever vague reasons shown on the application (which did not show any nexus between the suspects and a suspected offence or offences) for the continued detention of each of them were without any foundation (see p 619G). F
- (8) Sections 28 and 117 have been inserted into the CPC for a good reason, so that the detention by the police of a person beyond 24 hours after his arrest is not as a result of an executive act but as a result of a judicial decision in consonance with art 5(4) of the Federal Constitution. It was unfortunate that the magistrate did not advert to what was required of her under s 117 (see p 619H). G
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A [Bahasa Malaysia summary]

Pada 9 November 1996, 67 orang ditangkap oleh polis dalam suatu tunjuk perasaan yang dikatakan berlaku di Asia Hotel, Kuala Lumpur. Orang yang disyaki telah ditahan di bawah s 117 Kanun Prosedur Jenayah (NMB Bab 6) ('KPJ') dari 10 November 1996 hingga 13 November 1996. Suatu permohonan di bawah s 117 KPJ kemudiannya dibuat kepada majistret untuk pelanjutan tempoh tahanan 10 orang yang disyaki untuk 10 hari lagi, iaitu dari 13 November 1996 hingga 22 November 1996. Di bawah tajuk 'Alasan-Alasan' dalam permohonan, ia dinyatakan, antara lain, bahawa permohonan sedemikian harus dibuat sebab tempoh tahanan adalah terlalu pendek dan tidak mencukupi bagi membolehkan polis menyelesaikan siasatan. Di penutup nota prosiding, majistret menyatakan bahawa beliau berpuas hati dengan alasan-alasan seperti yang muncul dalam permohonan dan juga dalam diari penyiasatan yang diberikan. Beliau seterusnya membenarkan permohonan untuk melanjutkan tempoh tahanan. Nampaknya, diari penyiasatan yang telah dirujuk oleh majistret terdiri daripada tiga helai kertas yang ditaip, yang mempunyai tajuk 'Pergerakan Soalsiasat Tahanan' dan suatu jadual waktu yang menunjukkan masa apabila 10 orang yang disyaki dibawa keluar dari dan dihantar balik ke sel di mana mereka ditahan. Pada waktu petang 13 November 1996, suatu permohonan yang memerlukan tindakan segera untuk kajian semula perintah tahanan majistret di bawah s 323 KPJ telah difailkan di Mahkamah Tinggi ('permohonan untuk kajian semula'). Aduan yang dibuat ialah bahawa perintah tahanan omnibus yang dibuat ke atas 10 orang tersebut oleh majistret tidak mematuhi s 117 KPJ.

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Diputuskan, mengetepikan perintah tahanan majistret:

- (1) Dari rekod prosiding dan dokumen yang digunakan oleh majistret, adalah jelas bahawa majistret tidak mengambil kira sifat ketat s 117 KPJ dan kes undang-undang atas perkara itu (lihat ms 615G-H).
- (2) Menurut s 117 KPJ, pegawai polis mempunyai kewajipan mandatori untuk menyampaikan sesalinan catatan dalam diari seperti yang disyaratkan di bawah s 119 KPJ apabila mengemukakan seorang yang disyaki di hadapan beliau (lihat ms 616E dan 617E-F).
- (3) Dalam kes ini, tiada salinan catatan dalam diari telah disampaikan kepada majistret. Ini telah menjejaskan permohonan untuk pelanjutan tempoh tahanan, oleh kerana ia bermakna bahawa majistret tidak mempunyai material yang disyaratkan (terutamanya yang dirujuk dalam s 119(1)(d)) untuk bertindak dalam siasatan kehakiman sama ada hendak membuat perintah atas tahanan lanjut (lihat ms 618B).

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- (4) Tiga helai kertas yang dikemukakan dalam kes ini tidak mengandungi salinan 'catatan dalam diari' seperti yang disyaratkan di bawah s 119, dan memang pun tidak mempunyai kaitan dengan prosiding 'sehari ke sehari' pegawai yang membuat siasatan polis yang dicatatkan ke dalam diarinya. Tambahan pula, jadual waktu yang disenaraikan dalam kertas-kertas itu tidak boleh dianggap sebagai salinan catatan yang disyaratkan di bawah s 119 (lihat ms 616I dan 617A-B). A
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- (5) Seksyen 117 KPJ juga menghendaki bahawa terdapatnya alasan bagi mempercayai bahawa tuduhan atau maklumat adalah berasas supaya pegawai polis boleh membuat permohonan untuk tahanan. Alasan-alasan ini adalah tertakluk kepada penelitian kehakiman. Harus dititikberatkan bahawa seseorang majistret tidak patut memberi perintah tahanan dalam jagaan polis tanpa berasa puas hati atas keperluan berbuat demikian dan bahawa tempoh tahanan juga harus dihadkan kepada keperluan kes berkenaan. Jika keperluan kes untuk tahanan atau tahanan lanjutan tidak ditunjukkan, tiada perintah tahanan patut dibuat (lihat ms 619A, E); *Bal Krishna v Emperor* AIR 1931 Lah 99 diikuti. C
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- (6) Kebebasan seseorang individu selepas ditangkap menghadapi risiko akan dan perkara 5(4) Perlembagaan Persekutuan meletakkan kewajipan kehakiman ke atas majistret dalam menentukan sama ada seseorang harus ditahan atau ditahan untuk tempoh selanjutnya (lihat ms 618G). E
- (7) Permohonan untuk lanjutan tahanan merupakan suatu permohonan omibus untuk tahanan 10 orang yang dinamakan, dan tiadanya butiran berkenaan mengapa setiap dari mereka telah ditangkap dan mengapa adalah perlu untuk melanjutkan tahanan setiap orang. Apa-apa sebab taksa yang ditunjukkan atas permohonan (yang tidak menunjukkan sebarang pertalian antara orang yang disyaki dan kesalahan atau kesalahan-kesalahan yang disyaki) untuk tahanan lanjutan setiap orang adalah tanpa sebarang asas (lihat ms 619G). F
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- (8) Seksyen-seksyen 28 dan 117 telah dimasukkan ke dalam KPJ atas sebab yang baik, supaya tahanan seseorang yang melampaui 24 jam selepas ditangkap oleh polis bukanlah akibat suatu tindakan eksekutif tetapi akibat suatu keputusan kehakiman mengikut perkara 5(4) Perlembagaan Persekutuan. Adalah dikesali bahawa majistret tidak mengambil kira apa yang dikehendaki di bawah s 117 (lihat ms 619H).] H

Notes

For cases on criminal procedure, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue). I

A Cases referred to*Bal Krishna v Emperor* AIR 1931 Lah 99*Burla Jayarami & Ors, Re* 1957 Cr LJ 1062*Hariharanand v The Jailor* 1954 Cr LJ 1317*Nabachandrar v Manipur Administration* AIR 1964 Man 39**B** *Polis DiRaja Malaysia v Keong Mei Cheng Audrey* [1994] 3 MLJ 296*Saul Hamid v PP* [1987] 2 MLJ 736*Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219**Legislation referred to****C** Criminal Procedure Code (FMS Cap 6) ss 28, 117, 117(1), 117(3), 119, 119(1), 323

Evidence Act 1950 ss 160, 259

Federal Constitution art 5(4)

Police Act 1967 s 27A(1)(c)

Criminal Procedure Code s 167, 167(1) [India]

D*Azahar bin Mohamed (Mohd Yusof bin Zainal Abidin with him)* (Deputy Public Prosecutor).*Hj Sulaiman Abdullah (Dominic Puthucheary, M Puravalen, R Kesavan and Malik Imtiaz with him)* for the applicants.**E****KC Vohrah J:** On 14 November 1996, acting in revision, I set aside the remand order made by a magistrate under s 117 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') where she allowed the detention of 10 persons by the police for another three days. I gave some short reasons for setting aside the remand order, and I now give my written grounds for**F**

making such an order.

The hearing of the case was as a result of an urgent application made on the afternoon of 13 November 1996 at 3.15pm for the order of the magistrate made that afternoon to be revised by the High Court under s 323 of the CPC. The complaint was that the omnibus remand order made on the 10 persons by the magistrate was not in compliance with s 117 of the CPC.

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I perused the record of proceedings and the documents which the magistrate purported to rely on when she made the order of detention on 10 persons that afternoon.

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It is unfortunate that the learned magistrate had not appreciated the strict nature of the provisions of s 117 of the CPC and the case law on the matter.

The arguments on law in open court on 14 November 1996 related purely to the record of proceedings, and the documents attached to the

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record.

Reasons of the Magistrate

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Under s 117(3) of the CPC, the magistrate is under a mandatory duty to give her reasons for making the remand order. At the end of her notes of proceedings, this was what she stated:

I am satisfied with the reasons as appear in the application and also in the investigation diary that was given. As a result I allow all suspects (10 persons) to be detained for three days under s 117 of the CPC starting from today.

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Application Before the Magistrate

The application referred to by the magistrate is a typewritten application addressed to the magistrate at Kuala Lumpur requesting for an extension of the detention period under s 117 of the CPC in respect of 10 named persons. Against these names is a typewritten note, 's 27(1)(c) Akta Polis 1967.' All counsel agreed that the section should read 's 27A(1)(c) of the Police Act 1967'.

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The Investigation Diary

Section 117 requires 'a copy of the entries in the diary hereinafter prescribed' relating to the case to be transmitted to the magistrate when producing a suspect before him.

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The nature of the diary is prescribed under s 119(i) of the CPC, which reads:

Diary of proceedings in investigation

119 (i) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth —

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(a) the time at which the order, if any, for investigation reached him;

(b) the time at which he began and closed the investigation;

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(c) the place or places visited by him; and

(d) a statement of the circumstances ascertained through his investigation.

Three sheets of typewritten paper with the heading 'Pergerakan Soalsiasat Tahanan' (Suspects' Interrogation Movement') and showing a timetable of the times the 10 suspects were taken out ('keluar') and brought in ('masuk') — presumably in reference to their being taken out from and being sent back to the cells where they were detained — appeared in the record of proceedings. These papers were apparently shown to the magistrate and it was the view of DPP Azahar that these papers were the so-called investigation diary, and were referred to in the magistrate's notes. I think that was what the magistrate probably had in mind. But these three sheets of paper did

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A not contain copies 'of entries in the diary' prescribed under s 119, and certainly did not relate to 'the day by day' proceedings of the officer making the police investigation which were entered into his diary; and by no stretch of the imagination, if he or other officers had entered any, can the timetable listed in the papers be considered as copies of the entries prescribed under s 119.

B In these modern times with photocopying or photostating machines being readily available, it is hard to see why copies of the entries could not be made and be transmitted to the magistrate. As was pointed out, there was no fear of premature disclosure to the defence as the arrested person cannot call for or inspect the diary unless the police officer concerned refers to it for the purposes of ss 259 or 160 of the Evidence Act 1950; in which case, only such parts of it as are referred to shall be shown to the arrested person. This is so provided in s 119(1). As was remarked by Edgar Joseph Jr J (as he then was) in *Saul Hamid v PP* [1987] 2 MLJ 736 at p 739, after reference to s 119:

D Consequently, subject to the very limited exceptions mentioned, neither the arrested person nor his counsel (if present) would have any means of knowing of the entries in the diary unless, of course, the magistrate or the police officer makes disclosure thereof during the proceedings — events I would regard as most unlikely.

E It has to be noted that the duty of a police officer to transmit to a magistrate a copy of the entries in the diary prescribed under s 119 is couched in clear mandatory terms under s 117(1) which reads:

Procedure where investigation cannot be completed within twenty-four hours

F 117 (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such Magistrate.

G In *Polis DiRaja Malaysia v Keong Mei Cheng Audrey* [1994] 3 MLJ 296 at p 303, Syed Ahmad Idid J commented on the requirement under s 117(1) after discussing the format of the diary and the details needed therein thus:

H These details provide the true proceedings in the investigation in compliance with what is required by s 119(1) of the CPC. A copy of this is what the officer must supply the magistrate under s 117. This to obviate the necessity of the magistrate having to examine the complainant and recording the examination (see Ch XV and s 133; compare s 117(3) with s 135(2) of the CPC). So I have at this stage to say that the police in this case did not transmit to the magistrate a copy of the proper entries in the diary. This goes against the requirements of s 117. How then could the magistrate (or registrar in our case) make any decision to continue detention of the

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respondent? As a matter of law, not only must the diary be in the form specified by s 119 of the CPC but it must also be replete with grounds indicating that the information against the accused (or respondent) is well founded.

In this case, no copy of the entries in the diary was transmitted to the magistrate. The failure to transmit to the magistrate a copy of the entries was fatal to the application before the magistrate as it meant that the magistrate did not have the prescribed material (especially that referred to in s 119(1)(d)) to act upon in her judicial enquiry whether to order further remand (see *Re Burla Jayarami & Ors* 1957 Cr LJ 1062 in respect of the equipollent section, s 167 of the Indian Criminal Procedure Code). She had no jurisdiction to make the order of remand.

Commenting on s 167 of the Indian Criminal Procedure Code this is what Tirumalpad JC had to say in *Nabachandrar v Manipur Administration* AIR 1964 Man 39 at p 45:

This court has given instructions in many judgments to the police and to the magistrates that the provisions of s 167 of the CPC should be scrupulously observed, that the copy of the Police Diary should be produced when the accused is brought to the court, and that the magistrate cannot remand the accused without satisfying himself that a remand was necessary on a perusal of the said diary. The learned advocate who appeared for the petitioner stated that the decision of this court, *Gaibidingpao Kabui v Union Territory of Manipur* AIR 1963 Manipur 12 was brought to the notice of the magistrate in the course of the arguments in this case, in which in para 13, this court had pointed out that if the police did not transmit to the court a copy of the entries in the diary relating to the case to satisfy the magistrate that there were grounds for believing that the accusation or information was well founded, and that a remand was absolutely necessary for the purpose of investigation, the magistrate had no jurisdiction to direct the detention of the arrested person ...

I think it is apposite to set out what the learned judge had to further state in order to prevent a lapse in performing a judicial duty arising from the thinking that the magistrate's function is merely routine and cursory. The liberty of an individual after arrest is at stake and art 5(4) of the Federal Constitution reposes an onerous judicial duty on a magistrate to decide whether a person should be detained or detained further. The learned judge reminds us:

There is an impression among the police ... that the remand of an arrested person should be done by the magistrate as a matter of course. The sooner this impression is got rid of, the better it will be. I wish to impress on all the magistrates as well as on the police that it is the duty of the police to comply with the provisions of s 167(1) of the CPC and that the magistrate should insist on such strict compliance and if the police do not satisfy the magistrate with the documents that a remand was necessary, for the purpose of investigation, the magistrate may release the accused.

A *Ground Subject to Judicial Scrutiny*

I need to deal further with s 117 on other aspects of the case before me. Section 117 also requires that there be 'grounds for believing that the accusation or information' is well founded for the police officer to make his application for detention. These grounds, needless to say, are subject to judicial scrutiny.

What is the accusation or information against each of the 10 named persons? The three paragraphs in the application set out vague and general statements from which it is not possible to make any coherent inference.

C What is it that each of the suspects was arrested for? For being a member of a 'demonstration' by the Barisan Bertindak Rakyat Malaysia mentioned in the opening paragraph and para 2.2 under the heading 'Alasan-Alasan', or for being a member of the meeting of the NGO at Hotel Asia? There was nothing to show that either the demonstration or the meeting was banned by the government. What was the offence or suspected offence each of the 10 was arrested for? In other words why was there a need to detain each and every of the 10 suspects? Why was there a need to detain each for a further period?

E It has to be stressed that a magistrate ought not give a remand order in police custody without his satisfying himself as to its necessity and that the period of remand ought also to be restricted to the necessities of the case (see *Bal Krishna v Emperor* AIR 1931 Lah 99). If the necessities of the case for remand or further remand are not shown, no remand order should be made.

F I cannot see anywhere anything in the application — even if one were to assume that a copy of entries of the diary had been produced to the magistrate — to show a basis for the arrest and detention of each of the 10 persons be it even on a 'reasonable suspicion' (see *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 at p 221 on the test of 'reasonable suspicion'). There was no first information report produced and there was no statement of the circumstances ascertained through the officer's investigation (see s 119(1)(d)). Whatever vague reasons shown on the application (which did not show any nexus between the suspects and a suspected offence or offences) for the continued detention of each of them were without any foundation.

H It will be noted that ss 28 and 117 have been inserted into the CPC for a good reason, so that the detention by the police of a person beyond 24 hours after his arrest is not as a result of an executive act but as a result of a judicial decision in consonance with art 5(4) of the Federal Constitution (see also *Hariharanand v The Jailor* 1954 Cr LJ 1317 at p 1321). It is unfortunate that the magistrate did not advert to what was required of her under s 117. Her reasons for making the order were not in compliance with the strict requirements of s 117. Admittedly, the language of s 117 is terse and brief but there is case law on it and the learned magistrate

perhaps did not appreciate the full import of the section. The order made by her was misconceived and I therefore set aside the omnibus order made by her. A

Order accordingly.

Reported by Isabel Liong B

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